Cho Yu-Lon v Arab-Malaysian Finance Bhd

HIGH COURT (PULAU PINANG) — BANKRUPTCY NO 29–239 OF 2001
KAMALANATHAN RATNAM J
12 MARCH 2003

Bankruptcy *— Petition — Validity of creditor's petition — Copy of petition not annexed to affidavit verifying petition — Effect thereof — Whether failure to identify the items intended to dispute a breach of r 117 — Whether failure to annex original petition to affidavit was a non-compliance of r 106 and Form 11 — Bankruptcy Rules 1969 r 106 and Form 11*

This was an appeal against the decision of the learned deputy registrar in dismissing the judgment debtor's application to strike out the creditor's petition. The judgment debtor contended that the creditor's petition filed was defective and did not contain the affidavit of truth of the statement and was therefore in non-compliance with r 106 and Form 11 of the Bankruptcy Rules 1969 ('the Rules'). The judgment creditor raised a preliminary objection to the appeal in respect of the notice that the judgment debtor was required to file pursuant to r 117 of the Rules whereby the judgment debtor had to specify the statement in the petition which he intended to deny or dispute. The issues to be determined by the court were: (i) whether the judgment debtor had failed to identify the items he intended to dispute and was in breach of r 117 of the Rules; and (ii) whether there had been non-compliance with r 106 of the Rules since the creditor's petition did not have annexed to it the affidavit verifying the petition.

Held, dismissing the appeal with costs:

(1) All that the judgment debtor had said was that he intended to oppose the prayers sought in the creditor's petition and that he was disputing the debt. The judgment debtor had failed to identify the items he intended to dispute and thus, clearly was in breach of r 117 of the Rules (see p 292F–H).

(2) The verifying affidavit prescribed by r 106 of the Rules was based on Form 11 which required the petition to be annexed to it. The petition must be tied to, or bound to, or attached to, or joined to, or affixed to, or stapled to the verifying affidavit so as to avoid any dispute as to what exactly was being verified (see p 293A–B); *Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526 followed.

(3) In the present case, what the petitioner did was to annex a copy of the petition as an exhibit to the affidavit verifying the petition. The exhibit was clearly stapled to the affidavit with the marking sheet bearing exh A on the certificate attached to the exhibit. There had been proper compliance with r 106 and Form 11 of the Rules although the original creditor's petition was not attached to the affidavit verifying the petition. Thus, no substantial injustice had been done to the judgment debtor by attaching a copy of the

creditor's petition as an exhibit to the affidavit verifying the petition (see p 293B–E). A

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan timbalan pendaftar yang bijaksana kerana menolak permohonan penghutang penghakiman untuk membatalkan petisyen pemiutang. Penghutang penghakiman menegaskan bahawa petisyen pemiutang yang difailkan adalah cacat dan tidak mengandungi afidavit sebenar pernyataan dan oleh itu tidak mematuhi k 106 dan Borang 11 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah tersebut'). Pemiutang penghakiman telah menimbulkan satu bantahan awal terhadap rayuan berhubung dengan notis yang mana penghutang penghakiman dikehendaki memfailkan menurut k 117 Kaedah-Kaedah tersebut di mana penghutang penghakiman perlu menentukan pernyataan dalam petisyen yang beliau berniat untuk menafikan atau mempertikaikan. Persoalan-persoalan yang perlu ditentukan oleh mahkamah adalah: (i) sama ada penghutang penghakiman telah gagal untuk mengenalpasti butir-butir yang beliau berniat untuk mempertikaikan dan telah melanggar k 117 Kaedah-Kaedah tersebut; dan (ii) sama ada terdapat ketidakpatuhan k 106 Kaedah-Kaedah tersebut kerana petisyen pemiutang tidak dilampirkan bersamanya afidavit yang menentusahkan petisyen tersebut. B C D E

Diputuskan, menolak rayuan dengan kos:

(1) Apa yang penghutang penghakiman nyatakan adalah bahawa beliau berniat menentang permohonan-permohonan yang dipohon dalam petisyen pemiutang dan bahawa beliau mempertikaikan hutang tersebut. Penghutang penghakiman gagal mengenalpasti butir-butir yang beliau berniat untuk mempertikaikan dan oleh itu, jelas telah melanggar k 117 Kaedah-Kaedah tersebut (lihat ms 292F–H). F

(2) Afidavit yang menentusahkan seperti yang ditetapkan oleh k 106 Kaedah-Kaedah tersebut adalah berdasarkan Borang 11 yang memerlukan petisyen tersebut dilampirkan bersamanya. Petisyen tersebut perlu diikat, atau dilampirkan, atau dicantumkan, atau diletakkan, atau dikokotkan kepada afidavit yang menentusahkan bagi mengelakkan daripada apa-apa pertikaian tentang apa sebenarnya yang ditentusahkan (lihat ms 293A–B). G H

(3) Dalam kes semasa, apa yang pempetisyen buat adalah untuk melampirkan salinan petisyen sebagai ekshibit kepada afidavit yang menentusahkan petisyen tersebut. Ekshibit tersebut dengan jelas telah dikokotkan kepada afidavit tersebut dengan kertas penanda yang menunjukkan ekshibit A di atas sijil yang dilampirkan kepada ekshibit tersebut. Kaedah 106 dan Borang 11 Kaedah-Kaedah tersebut telah dipatuhi dengan betul walaupun I

petisyen pemiutang yang asal tidak dilampirkan kepada afidavit yang menentusahkan petisyen tersebut. Oleh itu, tiada ketidakadilan yang substantif telah dilakukan kepada penghutang penghakiman dengan melampirkan salinan petisyen pemiutang sebagai ekshibit kepada afidavit yang menentusahkan petisyen tersebut (lihat ms 293B–E).]

Notes

For cases on the validity of creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1905–1922.

Cases referred to

Ooi Thean Chuan v Banque Nationale de Paris [1992] 2 MLJ 526 (folld)

Yap Kin, Re; ex p United Malayan Banking Corp Bhd [1996] 5 MLJ 355 (refd)

Legislation referred to

Bankruptcy Act 1967 s 131
Bankruptcy Rules 1969 rr 106, 117, Form 11

KH Ng (*SH Ang & Co*) for the judgment debtor.
Rusmin Alwani Shukery (*Shahrizat & Tan*) for the judgment creditor.

Kamalanathan Ratnam J: The judgment debtor's application (encl 8) to strike out the creditor's petition was dismissed by the learned deputy registrar. This is the appeal against that decision.

In his supporting affidavit, the judgment debtor contended that the creditor's petition dated 31 May 2001 was defective and raised various grounds. However, before me, counsel for the judgment debtor relied only on the following issues:

Breach of s 6(1) of the Bankruptcy Act 1967

The said section reads as follows:

'A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served as prescribed.'

The judgment debtor pointed out that the creditor's petition filed did not have the affidavit of truth of the statement contained in the said petition and was therefore in non-compliance with r 106 of the Bankruptcy Rules 1969 ('the Rules') which reads as follows:

Verification

1 A creditor's petition shall be verified by affidavit.

2 A petitioning creditor who cannot himself verify all the statements contained in his petition shall file an affidavit made by some person who can depose to them.

The applicant also argued that there was non-compliance with Form 11 of the Rules. The Form as it should be is reproduced herewith.

No 11
(Rule 106)
(Title)

AFFIDAVIT OF TRUTH OF STATEMENTS IN PETITION

I, the petitioner named in the petition hereunto annexed, affirm (if the petitioner declare or affirm, alter the form accordingly) and say:

1 That the several statements in the said petition are within my own knowledge true.

Affirm at, etc ...

NOTE — If the petitioner cannot depose that the truth of all the several statements in the petition is within his own knowledge, he must set forth the statements the truth of which he can depose to, and file a further affidavit by some person or persons who can depose to the truth of the remaining statements.

Preliminary objection

Counsel for the judgment creditor however raised a preliminary objection to the appeal in respect of the notice that the judgment debtor was required to file, pursuant to r 117 of the Rules. The said rule reads as follows:

Debtor intending to show cause

Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

Cik Rusmin for the judgment creditor pointed out that what the said notice filed by the judgment debtor showed was that the judgment debtor intended to dispute the debt. All that the judgment debtor has said is that he intends to oppose the prayers sought in the creditor's petition and that he therefore is disputing the debt. However, pursuant to r 117 of the Rules, the judgment debtor must specify the statement in the petition which he intends to deny or dispute. The detailed particulars as contained in the creditor's petition contains 20 different items with their respective calculations.

There are also set out 16 instances when payments were credited. The judgment debtor has indeed failed to identify the items he intended to dispute. This to my mind is clearly a breach of r 117 of the Rules. On this preliminary issue itself, I find for the judgment creditor.

Verification of creditor's petition

It is the case of the judgment debtor that since the creditor's petition did not have annexed to it, the affidavit verifying the petition, there has been non-compliance with r 106 of the Rules. In fact, I am of the view that the judgment debtor has got it the wrong way round.

In *Re Yap Kin; ex p United Malayan Banking Corp Bhd* [1996] 5 MLJ 355, I held, obiter, that the correct and only satisfactory way to verify a creditor's petition is to annex a copy of it to the affidavit verifying it. In *Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526, Edgar Joseph Jr J (as his Lordship then was) held that the verifying affidavit prescribed by r 106 is based on Form 11 which requires the petition to be annexed to it. His Lordship further held that the petition must be tied to, or bound to, or attached to, or joined to, or affixed to, or stapled to the verifying affidavit so as to avoid any dispute as to what exactly is being verified.

In the case before me, what the petitioner did was to annex a copy of the petition as an exhibit to the affidavit verifying the petition. The exhibit was clearly stapled to the affidavit with the marking sheet bearing exh A on the certificate attached to the exhibit. I am of the view that there has been proper compliance with r 106 and Form 11 of the Rules, although the original creditor's petition was not attached to the affidavit verifying the petition.

Bearing in mind the provision of s 131 of the Bankruptcy Act 1967 which states that:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court, ...

I find that no substantial injustice had been done to the judgment debtor by attaching a copy of the creditor's petition as an exhibit to the affidavit verifying the petition.

In the circumstances, I dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Ezatul Zuria Azhari